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ABSTRACT

This guide for school district administrators presents workshop materials for administrators' mutual training. The guide assists administrators in preventing lawsuits by teachers against the district for violations of the First Amendment right to freedom of speech. Section 1, the introduction, offers two objectives: to acquaint administrators with teachers' legal limits on the First Amendment right to speak freely on matters of public concern and to discuss school boards' legal rights to limit teachers' classroom autonomy, or "academic freedom." Section 2, "Preliminary Considerations," gives examples of U.S. Supreme Court rulings defining speech that is protected and that which is not. "Teachers' Rights to Speak as Citizens," section 3, analyzes repercussions of the "balancing test" used by the court to establish rights public employees may be allowed under the First Amendment. Section 4, "Academic Freedom," notes that, although teachers do not possess a clearly defined constitutional right to academic freedom, lower courts often support the right. The Supreme Court's position is put into perspective by examples and hypothetical case exercises. Section 5, the conclusion, pursues finer points of applying the academic freedom standard. Seven handouts and 12 transparency masters are appended. (CJH)

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FREEDOM OF SPEECH: A PRESENTER'S GUIDE

RESEARCH BASED TRAINING FOR SCHOOL ADMINISTRATORS

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CENTER FOR EDUCATIONAL POLICY AND MANAGEMENT

COLLEGE OF EDUCATION, UNIVERSITY OF OREGON

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EA 018 623

Freedom of Speech

PROJECT LEADERSHIP PRESENTER'S GUIDE

Prepared by the Research-Based Training for School Administrators Project

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A training model called Project Leadership developed by the Association of California School Administrators (ACSA) and directed by James Olivero was selected as a vehicle for the purpose of disseminating research and state-of-the-art materials to school administrators. Project Leadership is built upon two key ideas: networking and administrators training one another using scripted workshop materials called Presenters' Guides. This is a Presenter's Guide developed by the team at the Center for Educational Policy and Management (CEPM).

All members of our team at CEPM have contributed in some way to this material. They include Bruce Bowers, Damon Dickinson, Susan Gourley, Dennis Pataniczek, and Max Riley. We are grateful to David Horowitz and Sissel Lemke for their clerical assistance.

USING THE GUIDE

The guide is written so that it can be read aloud, but we believe you will want to make changes and provide your own examples. You should adapt the material to your personal needs and the needs of your audience.

You are equipped with the Presenters' Guide, which contains a script and suggestions for the conduct of the session. In the back you will find the following: 1) a list of the legal cases cited in the text, 2) handouts, and 3) masters of numbered transparencies that have been designed to give visual emphasis to the main points of your presentation.

PRIOR TO THE WORKSHOP

1. Review guide -- the script, transparency masters, and handout materials -- prior to the workshop.
2. Prepare copies of handout materials for each participant.
3. Prepare transparencies from the "masters." These are especially appleai
4. Arrange for meeting room facilities: Ideally, the facilities will offer places for participants to write as well as areas for breaking up into small groups.
5. Arrange to have an overhead projector, screen, three-prong adapter and extension cord at the meeting room. Insure that the room is equipped with a chalkboard or flipchart visible to all participants.
6. Arrange for coffee or other refreshments, if desirable.

OUTLINE

1.0 INTRODUCTION

- 1.1 Workshop objectives
- 1.2 First amendment rights
- 1.3 Activity: Hypothetical case study
- 1.4 Freedom of speech

2.0 PRELIMINARY CONSIDERATIONS

- 2.1 Definition of speech protected under the First Amendment
- 2.2 Definition of speech not protected under the First Amendment

3.0 TEACHERS' RIGHTS TO SPEAK AS CITIZENS

- 3.1 The "balancing test"
- 3.2 The Pickering case
- 3.3 Grounds for dismissal
- 3.4 Issues of public concern
- 3.5 Cases involving both protected and unprotected expression

4.0 ACADEMIC FREEDOM

- 4.1 Standards for taking disciplinary action against teachers
- 4.2 Activity: Hypothetical case study

5.0 CONCLUSION

1.0 INTRODUCTION

On November 16, 1982, an Oregon federal district judge issued a ruling that may ultimately force an Oregon school district to pay a total of $85,000 in court costs and damages [Anderson v. Central Point School District 554 F. Supp. 600 (1982)]. The damages and costs assessed against the district were a direct result of the superintendent's violation of a teacher's First Amendment right to freedom of speech. The plaintiff argued that a teacher-coach had violated a policy, established by the superintendent, which regulated school employees' communication with the school board. Instead of following the policy and funneling his communication through the superintendent's office, the teacher wrote directly to individual members of the school board criticizing their athletics policy. As a consequence, the superintendent revoked the teacher's coaching responsibilities, thus setting the stage for the teacher's suit against the district for violating his First Amendment rights.

1.1 This workshop is intended to help you prevent the occurrence of such suits in your districts.

Transparency #1
OBJECTIVES OF WORKSHOP To explore and define (1) Freedom of speech and (2) Academic freedom

My objectives are twofold. First, I hope to acquaint you with the legal limits on a public school teacher's First Amendment right, as a citizen, to speak out freely on matters of public concern. In addition, I will have a few words to say about the school board's legal rights to place limits upon a public school teacher's autonomy in the classroom, or, as some courts have expressed it, upon

a teacher's "academic freedom."

1.2 As you know, these rights are embedded in the First Amendment to the U.S. Constitution which reads as follows.

Transparency #2

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The philosophy behind this amendment reflects some of the fundamental attitudes toward government of those who led the American Revolution. They strongly believed that gaining freedom from the tyranny of the British government was not enough. They needed to prevent a new tyranny from developing in the nascent American government. The Bill of Rights, which includes the first ten amendments to the Constitution,established for all future generations of Americans the right to be free from certain forms of governmental intrusions.

For most of our nation's history the First Amendment did not apply to state governments or subunits of the state governments, such as school boards. Note the phrase, "Congress shall make no law ...." The implication, supported by the Supreme Court until quite recently, was that the First Amendment (and, indeed, the entire Bill of Rights) applied only to actions by the federal government, not to those of state governments. Therefore, the original interpretation of First Amendment protection would not have included the right of a public school teacher to speak freely over the objections of the school board. Over the last half century, however, the Supreme Court has gradually broadened its

interpretation of the First Amendment so that now both federal and state actions can be challenged by individuals as violations of their First Amendment rights.

This means that the actions of school boards and school administrators now fall within the scope of the First Amendment. School board members and school administrators may not curtail a teacher's freedom of speech without risking a court suit. Over the last 15 years, awards granted by state and federal courts for damages incurred by school boards and administrators testify to the risks of being unaware of a teacher's First Amendment rights.

So we must now ask the question, Just what is meant by the concept of freedom of speech for public school teachers? Surely it doesn't mean that teachers may speak out anywhere, at any time, on any topic they choose to. Or does it? To help you to think more concretely about this question I have prepared a handout portraying the types of situations that are most likely to arise in the context of public school teaching.

Distribute Handout #1

1.3 Activity: Case Study

Participants may find this exercise somewhat intimidating at first. Remind them that you do not expect them to know the law in this area. The purpose of the exercise is to get them to think about the issues and to create greater interest by having them compare their ideas with what you have to say during the workshop.

Instruct participants to form small groups of 5 to 7 people. Ask participants to read the hypothetical case study and then confer on the potential violations of the teachers' right to freedom of speech and academic freedom under the First Amendment. Each group should appoint a spokesperson to represent the group. Allow participants 20-30 minutes to complete the exercise. Then summarize each group's analysis on separate pieces of newsprint attached to the wall.

1.4 Freedom of Speech

Now that we have pooled our knowledge and posted the results for all to see, let's begin our review of what the courts have had to say about a public school teacher's right to freedom of speech. Throughout the workshop we shall be returning to this hypothetical case study to gain further understanding of the situation.

As I noted at the outset, this workshop will cover two major types of teacher rights protected under the Freedom of Speech clause of the First Amendment: (1) A teacher's right, as a citizen, to freedom of speech. (2) Right of teachers to a degree of autonomy in the classroom ("academic freedom"). The first topic will receive more detailed attention because it has been more frequently litigated. As a result the U.S. Supreme Court has provided some clear standards regarding freedom of speech. The second topic, academic freedom, has been litigated less frequently and has never been addressed by the U.S. Supreme Court. Hence no national legal standards have been established for determining a public school teacher's right to academic freedom. Nonetheless, the topic is an important one, and lower court rulings have provided standards that are relatively consistent. I will present in detail one such standard as a means of providing some guildelines to school administrators regarding First Amendment protection for a teacher's classroom behavior.

2.0 PRELIMINARY CONSIDERATIONS

In considering whether a citizen's rights to freedom of speech have been violated by some state action, a court must first answer two fundamental preliminary questions.

Transparency #3
THRESHOLD QUESTIONS

1. Does the incident in question involve "speech" and not merely "conduct"?
2. Even if the action is "speech," is it so outrageous as to be unprotected by the First Amendment?

2.1 The first question is whether the incident under investigation really amounts to "speech" as that concept is defined under the First Amendment. The second is whether that speech is so extreme or outrageous that it falls outside the protection of the First Amendment.

Regarding the first question -- What amounts to speech under the First Amendment? -- courts have consistently ruled that verbal expression, either written or oral, constitutes "speech," and is, therefore, protected by the First Amendment unless it is outrageous.

But what about other types of expression not involving the use of words? In another landmark case regarding the First Amendment rights of students, the U.S. Supreme Court ruled that the wearing of black armbands by high school students to protest the Vietnam War constituted "speech" under the First Amendment [Tinker v. Des Moines Independent School District 393 U.S. 503 (1969)]. The rationale for this decision was that, while no words were employed, the armband constituted a symbol with a meaning that could clearly be verbalized. Thus, if a case can be made for the symbolic nature of a nonverbal expression, then such expression is protected by the First Amendment. Some kinds of conduct, however, have been viewed as having no symbolic content whatsoever regardless of how symbolic that conduct was to the individual responsible for it. For example,

courts have ruled that the length of a student's hair may not be accorded First Amendment protection - even though we are all aware how "symbolic" to the student his or her personal grooming style may be!

There are "gray areas," however, where it is not patently obvious to courts whether the conduct in question is or is not "speech" under the First Amendment. A recent federal appellate court examined one such problem when it considered a teacher's refusal to comply with a school district's dress code. [East Hartford Education Association v. Board of Education 562 F2d 838 (1977)]. The teacher refused to comply with a rule requiring teachers of academic subjects to wear ties. He viewed his noncompliance as an expression of his individuality and his refusal to be tamed by "the system." The crux of the debate among the judges who heard the case was whether this refusal, while obviously symbolic to the teacher, constituted "speech" as far as the First Amendment was concerned. In a very close decision, the court decided against the teacher and provided this rationale:

Distribute Handout #2

As a general rule, then, if a teacher's conduct is not clearly verbal, at least in terms of the symbolic message it represents, sanctions taken by the

district against that teacher's conduct are unlikely to be held to violate that teacher's right to "free speech" under the First Amendment.

Refer to Handout #1. Ask participants to consider which of the bases for the dismissal of Fred Freethinker would be considered outside the protection of the First Amendment. Note that while refusal to comply with the dress code would, following East Hartford, likely be viewed as conduct, not speech, the "obscene gesture," with its specific meaning, would likely be seen as speech.

2.2 The second threshold question to be considered is whether the speech in question is so outrageous as to be outside the protection of the First Amendment. Over the last half century the Supreme Court has identified four types of speech that fall into this category:

Transparency #4
TYPES OF SPEECH UNPROTECTED
BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement to Violence
4. Threat to National Security

The problem for the courts was to determine what is meant by each of these types of "outrageous" speech. The Supreme Court has fashioned a "standard" or definition for each type. Since some of these standards are rather complex, I will pass out a handout that presents the current standards.

Distribute Handout #3

It should be noted, however, that these definitions are not carved in stone. Rather, they are constantly being reshaped as different situations are brought

before the Court and different justices are appointed to serve on the Court. This has been especially true of the definition of "obscenity," a singularly controversial concept. No doubt that particular definition will go through several more transformations.

As you can see, all of these terms are quite narrowly defined so that only rather extreme kinds of expression would be disqualified from First Amendment protection. This is in keeping with the high value that is placed upon the right of citizens in this country to express themselves freely without harassment from the state.

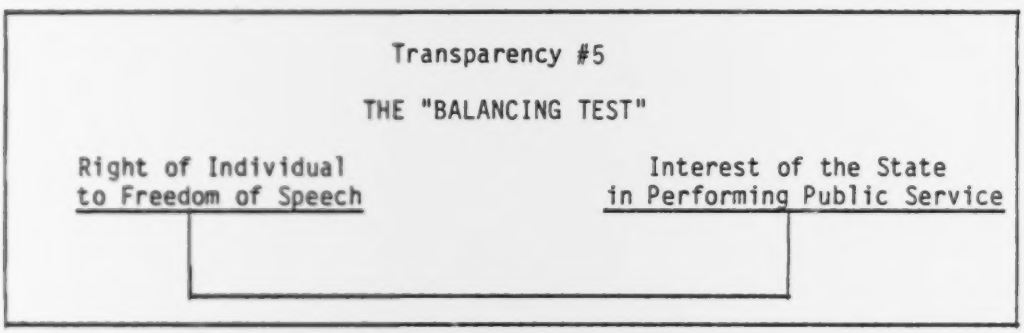
If the conduct under examination qualifies as speech and does not fall into one of the four categories of exception then it is considered speech protected by the First Amendment. The question now arises, may citizens be allowed to express themselves wherever and however they please, without interference by the government, as long as they are not being obscene, defaming someone, inciting violence, or presenting a threat to national security? The answer, of course, is no. The government may still regulate the time, place and manner of the expression. It simply may not, aside from the above-mentioned exceptions, regulate its <u>content</u>.

For example, while a citizen may stand at the local courthouse and read sections of the Bible or the Koran to all who pass by, he or she may not block the entrance to the courthouse in the process. You may recall the old one-liner, "Your right to swing your fist ends where my jaw begins." It is this fundamental notion that guides courts when they assess a citizen's right, under the First Amendment, to freedom of expression. Thus, a citizen may speak without censorship but not necessarily without regulation of time, place and manner of the speech.

3.0 TEACHERS RIGHTS TO SPEAK AS CITIZENS

Since public employees are in the anomalous position of being both private citizens and representatives of government, their right to speak freely is subject to even closer scrutiny by the courts. Public employees have the contractual duty to serve the public. In order to serve the public they must behave in a manner that will not impede the efficiency or effectiveness of the particular agency that employs them.

3.1 The U.S. Supreme Court, mindful of this dual role played by public employees, has devised what has come to be called a "balancing test." This test helps determine the latitude public employees may be given as citizens under the First Amendment to speak out on subjects that concern them.


Transparency #5
THE "BALANCING TEST"
Right of Individual to Freedom of Speech
Interest of the State in Performing Public Service

Under this test, if an individual complains that his or her right to free speech has been violated by a school board, the Court will balance the interest of the individual in the right to free speech against the interest of the school board in providing educational services. One state legislature has established the following bases for the dismissal of permanent teachers:

Transparency #6

(a) Inefficiency;
(b) Immorality;
(c) Insubordination;
(d) Neglect of duty;
(e) Physical or mental incapacity;
(f) Conviction of a felony or of a crime involving moral turpitude;
(g) Inadequate performance;
(h) Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or
(i) Any cause which constitutes grounds for the revocation of such permanent teacher's teaching certificate.

Legislatures, however, seldom define what these bases for dismissal mean in concrete terms. Instead, local boards must establish policies that give specific meaning to the general guidelines, giving them a fair degree of latitude in determining the criteria upon which to base dismissal decisions. Presumably these criteria are established with the "public interest" in mind.

In a situation where a dismissed teacher claims the dismissal violated his or her First Amendment rights, the court must determine the answer to the following question: Does the nature of the "public interest" being served by the dismissal outweigh the right of the teacher to express himself or herself in the particular manner that precipitated the dismissal? The legal answer to this question can only be determined by the application of the "balancing test."

In the case of Pickering v. Board of Education, the U.S. Supreme Court described the problem this way.

Transparency #7

"The problem, in any case, is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [Pickering v. Board of Educ. 391 U.S. 593, 567 (1978)]

In the context of public education, the State is usually represented by the local school board. Under the balancing test, it must be determined whether a contested school board action promotes an efficient and effective educational system and, if so, whether that interest outweighs the right of a teacher, as a citizen, to "comment upon matters of public concern."

So far the discussion has been relatively abstract. Let's make things a bit more concrete by presenting some situations, based on cases decided by the U.S. Supreme Court, that illustrate the use of the balancing test.

The first situation involves a teacher who wrote a letter to the editor criticizing a school board's use of school funds and the manner in which the board represented that use to the taxpayers. Take a few minutes to read through this handout describing the situation.

Distribute Handout #4

Pickering ultimately appealed his case to the U.S. Supreme Court and won a judgment that the dismissal violated his First Amendment rights to free speech. Let's look closely at the reasoning that supported this decision.

In analyzing the situation represented in the handout, the U.S. Supreme Court first raised some critical questions about the content of Pickering's letter. The school board alleged in its brief before the court that Pickering's

letter was so inaccurate and so malicious in its intent that it constituted defamation of the school board.

Transparency #8

TYPES OF SPEECH UNPROTECTED BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement to Violence
4. Threat to National Security

If the board had been able to convince the court that this was true, then the court would not have proceeded to an application of the balancing test. As discussed earlier, it would have ruled that the dismissal was not a violation of Pickering's First Amendment rights since his letter included speech so outrageous or so extreme as to be unprotected by the First Amendment. However, the U.S. Supreme Court determined that the letter, while containing certain inaccuracies, did not qualify as "defamation" under the legal definition.

By declaring Pickering's letter within the zone of protected speech, the court was now ready to apply the "balancing test." Prior to the Pickering case, the court had generally placed a great deal of weight on the interests of the state when faced with criticism by its own employees. Its reasoning had been that public employees were obligated, in their role as public servants, to consider themselves as less than full citizens when it came to matters pertaining to their employment. That is, their rights to speak freely on matters related to their work, even on issues of general public concern, were by definition out-

weighed by the interest of their employer to maintain the "efficiency of the public services...." This position reflected the notion that any type of criticism was, in and of itself, disruptive of the desired efficiency.

3.3 Pickering's case gave the U.S. Supreme Court an opportunity to change that notion. The Court now determined that only under certain conditions could a public employer dismiss an employee on grounds that his or her speech was disruptive of the efficiency of the workplace. Those conditions are summarized as follows:

Transparency #9

Does the teacher's speech affect

1. maintenance of discipline by his/her immediate superiors?
2. harmony among co-workers?
3. proper performance in the classroom?
4. operation of the school generally?

The first element is based on the theory that part of the proper functioning of an organization depends upon the personal loyalty of workers to their immediate supervisors and upon the confidence that supervisors place in those they supervise. In Pickering's case, it was ruled that his critical comments were directed at the school board and the district superintendent but not at the school principal. Therefore, Pickering's letter "passed" the first element of the test.

The second element is based upon the theory that harmonious working relationships are essential to the efficient and effective operation of an organization. The board had charged that the publication of the letter fomented controversy and conflict "among the Board, teachers and residents of the

district." However, the record revealed no such disruption among teachers or residents. In fact the court noted that the letter was greeted "with massive apathy and total disbelief." Thus, under the second element, there was no basis for finding that Pickering's letter disrupted the harmony of the working relationships with his colleagues.

Finally, the court considered whether the publication of the letter interfered with Pickering's proper performance in the classroom or with the regular operation of the schools generally. Again, given the general apathy with which the public greeted the letter, there was no basis for asserting that any such interference had taken place.

If the court had been convinced that any <u>one</u> of the three elements had been established - an effect on maintenance of discipline by the teacher's immediate supervisor, disruption of harmony among his coworkers, or interference with his proper performance in the classroom or with the operation of the school generally - then it might have determined that the interest of the state in condemning the publication of the letter outweighed the right of the teacher to express himself on an issue of public concern.

3.4 While the so-called "<u>Pickering</u> test" provides the core criteria by which to determine whether or not a teacher's expression is protected by the First Amendment, there are two related considerations that require some attention.

Transparency #10

1. What are "issues of public concern?"
2. What can be done in the case of a teacher who engages in both "protected" and "unprotected" expression?

The first consideration concerns the content of the "speech." According to the balancing test outlined in Pickering, the speech is protected by the First Amendment only if it focuses upon "matters of public concern." Another U.S. Supreme Court decision attempted to clarify this concept in a case involving an assistant district attorney. [Connick v. Myers 103 S. Ct. 1684 (1983)]

Sheila Myers, angered by a proposal to transfer her from her position as assistant district attorney to a different section of the Louisiana Attorney General's office, conducted a survey of her coworkers concerning their views on the office transfer policy. She also asked questions on related issues, such as office morale, the need for a grievance committee, the level of confidence in supervisors and whether employees felt pressured to work in political campaigns. The court ruled that the survey, while it amounted to "speech" under the First Amendment, was only minimally about "matters of public concern." Except for the question regarding pressures to work in public campaigns, the survey contained questions that pertained exclusively to work related matters. These matters, the court said, are of concern only to office workers, not to the public at large.

Since the survey was only marginally about "matters of public concern," the court added a fourth element to those provided in Pickering, one that considerably weakened the rights of the individual and strengthened the interests of the state in the balancing test. The court ruled that in such a situation the First Amendment doesn't require that a public employer "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." (Connick, p. 1694) Thus, it appears that the weight accorded to the rights of the individual public employee to "speak out on matters of public concern" is considerably reduced when the speech

is merely a grievance regarding the manner in which employees are treated.

Let us review the discussion so far.

Distribute Handout #5

This handout outlines the key criteria that we have discussed so far. We have used the initial handout regarding Fred Freethinker for the application of criteria 1 and 2. Now let us take a look at how we might apply the Pickering test (#3) to the situation in the first handout.

Pause and ask if anyone has questions about the content of the handout.

Encourage discussion of the application of the "Pickering test" to Fred Freethinker's conduct. Note that the only behavior under consideration is likely to be the letter, since the use of an "obscene gesture" to illustrate symbolism is not likely to be seen as a "matter of public concern." The content of the letter, however, is likely to be viewed as such, since the curriculum of a school system goes to the heart of the educational enterprise.

Assume for the sake of the analysis that a court would rule the content of the letter to be "of public concern." Now turn to the remaining elements of the Pickering test.

1. Did the letter's publication affect the maintenance of discipline by Fred's immediate supervisor?

The response is likely to be "no," since the only person criticized, Dr. Wright, is not Fred's immediate supervisor. In Pickering, the court made the distinction between the building administrator, with whom Pickering had daily contact, and the administrators from the central office, whom he encountered infrequently.

2. Did the letter's publication affect the harmony of Fred's working relationships?

There is no evidence of this. Only one co-worker even noticed the letter, and he responded vaguely but positively.

3. Did the letter's publication affect Fred's performance in the classroom or the operation of the school generally?

Again there is no evidence of this. Wright said that the operation of the central office was disrupted, but such disruption is not the sort that a court would see as affecting the education of the children, which is the critical consideration from a public policy perspective.

> Therefore, on balance, considering all the elements of potential disruption resulting from the letter's publication, it is likely that such disruption is minimal and that, therefore, the right of Fred to publish that letter outweighs the school's interest in preventing its publication.
>
> Accordingly the dismissal of Fred, based on publication of the letter, is likely to be found in violation of his First Amendment right to freedom of expression.

Based on the analysis so far, evaluators may wonder whether they now lack the authority to discipline a teacher who has engaged in "speech" protected by the First Amendment, regardless of what other sorts of unprofessional behavior that teacher might have engaged in. Consider the following situation, also based upon a U.S. Supreme Court decision. [Mt. Healthy City School District Bd. of Ed. v. Doyle 429 U.S. 274 (1976)]

Distribute Handout #6

By applying the standard developed in the Pickering case to Doyle's situation, we could easily conclude that Doyle's First Amendment rights had been violated. The sending of the memo to the radio station is analogous to a letter to the editor. Indeed, the district court and the Sixth Circuit Court of Appeals, concluding that the memo incident had played a "substantial part" in the nonrenewal of Doyle's contract and that none of the mitigating factors identified in Pickering were present, found Doyle's nonrenewal to be a violation of his First Amendment right to freedom of expression. The Mt. Healthy School District was ordered to reinstate Doyle with back pay, pending an appeal to the U.S. Supreme Court.

The Supreme Court adopted a more critical stance on the matter. It reasoned that the lower court rulings placed school boards in the untenable position of being unable to discharge a teacher who had engaged in conduct justifying

dismissal simply because that teacher had also engaged in conduct protected by the First Amendment. A rigid application of the Pickering standard would, the court noted, "require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision - even if the same decision would have been reached had the incident not occured" (Mt. Healthy, p. 285).

To prevent such rulings in the future, as I mentioned earlier, the court added one more element to the standard it had developed in Pickering. Please read item number 4 in the handout I last distributed to refresh your memory.

This element means that even though a teacher's speech may play a substantial role in subsequent disciplinary measures, a court may still rule that imposing a sanction against the teacher is not a violation of that teacher's First Amendment right to freedom of expression. The burden is on the school board, however, to convince the court that it would have disciplined the teacher in the same manner regardless of that teacher's speech activity. In the case of Doyle, the court ruled that his dismissal was justified based on his "unprofessional" behavior.

> Now ask whether, in the case of Fred Freethinker, the board could show that there were enough factors, aside from the writing of the letter, to merit Fred's dismissal. The only possibilities are (1) his refusal to comply with the dress code and (2) his use of the "obscene gesture." Note that the first has already been analyzed as not constituting "speech" and therefore not protected by the First Amendment. So it stands as a possible basis for dismissal, but, by itself, may not be sufficient to merit dismissal. The other potential basis, Fred's use of an "obscene gesture" as a pedagogical device may be protected under the First Amendment.

So far, then, we see that Fred's dismissal is unlikely to be upheld. The substantial factor for dismissing him, the writing of the letter, we have

concluded is likely to be protected by the First Amendment. The Mt. Healthy standard (Item 4 in handout #5) requires the board to convince the court "by a preponderance of the evidence" that it would have dismissed Fred anyway based on other factors. We have suggested that one of the factors, Fred's refusal to comply with the dress code, is not by itself a strong enough basis for dismissal. We must now turn to the other factor, Fred's use of an "obscene gesture" as a pedagogical device to illustrate symbolism, and ask whether this behavior is protected by the First Amendment. That is, we must ask whether this conduct is considered part of Fred's right, as a teacher, to "academic freedom."

4.0 "ACADEMIC FREEDOM"

"Academic freedom" is not a precisely defined term, either in common usage or in court rulings. From a legal perspective, public school teachers possess no clear-cut constitutional right to academic freedom. The U.S. Supreme Court has not directly ruled on this issue and is probably reluctant to do so. This is because courts traditionally have deferred to school boards the right under state law to set the curriculum. Thus, if a teacher is dismissed or otherwise disciplined for not adhering to school board directives regarding curriculum, courts, more often than not, have supported the board's decision. Indeed, the U.S. Supreme Court, in a case involving the constitutionality of a board's removal of books from the school library, took great pains to distinguish that action from the board's responsibility to set curriculum. [Board of Educ. of Island Trees Union Free School District v. Pico 102 S.Ct. 2799 (1982)] Quoting from the brief prepared by the school board, the court stated:

> We are in full agreement with petitioners that boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political" (Pico p. 2806).

4.1 Nevertheless, some lower courts have overturned dismissals of teachers on grounds that the dismissal violated their right to "academic freedom." I will briefly discuss the standards that some of these courts have applied because they suggest that, at the very least, boards should exercise caution in disciplining teachers based on the content of their teaching. It is assumed at the outset that the teacher has been given fair warning regarding any prohibited subjects of classroom discussion, either in the form of clearly specified policies or a specific directive to cease the teaching of a particular subject. Without such warning, subsequent disciplinary action against the teacher, based on the content of what he or she is teaching, might be considered an additional violation of that teacher's right to notice under the due process clause of the Fourteenth Amendment. Discussion of the procedural aspect of academic freedom is beyond the scope of this workshop. However, the necessity of providing the teacher with notice of prohibited classroom topics cannot be overstated. A fundamental precept of American law is that individuals cannot be punished for violating rules of which they have not been informed.

Turning to the substantive aspect of academic freedom, courts note first that such freedom has not been specified in the First Amendment. Nevertheless, they reason that it is implicit in the concept of freedom of speech. The Supreme Court put it this way:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which

> does not tolerate laws that cast a pall of orthodoxy over the classroom.... The classroom is peculiarly the "marketplace of ideas." [Keyishian v. Board of Regents 386 U.S. 589 (1967) at 603]

This statement represents the Court's sensitivity to the possibility that allowing a board too much control over curricular matters could impinge upon the First Amendment rights of teachers. The standard that seems to be evolving from the lower courts begins with a consideration identical to that regarding a teacher's speaking out as a private citizen - namely, whether the content of the class presentation falls into one of the unprotected categories: obscenity, defamation, incitement to violence, or threat to national security.

Transparency #11

TYPES OF SPEECH UNPROTECTED BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement to Violence
4. Threat to National Security

Given the narrow definitions the courts have attached to these terms, no court to date has found that the contested classroom presentations fell into any of these categories. For example, while the objections often relate to the use of profanity or vulgarisms, or to sexual references in assigned readings, such content does not reflect the extremely narrow definition of obscenity discussed earlier today.

4.2 As an illustration of the sort of situation courts may be faced with

regarding academic freedom consider the following hypothetical case.

Distribute Handout #7

This hypothetical case squarely asks to what degree a teacher has a right to "academic freedom" under the First Amendment. The court first acknowledged that there is no longer any dispute regarding teachers' entitlement to First Amendment freedoms. Among the cases it cited for support was the Pickering case previously discussed. [Parducci v. Rutland 316 F.Supp 352, 354 (1970)]. It then began its analysis of whether the content of the short story constituted any of the types of "outrageous" speech outlined in Handout #3. The sexual references in the story might be viewed by some as "obscene" but the court quickly ruled that possibility out. By referring again to the standard for "obscenity" on Handout #2, I think you can see why. The standard is much too narrowly drawn to include the short story in question here.

The court next applied a balancing test, but the analysis began to diverge from the one developed by the Supreme Court to assess a teacher's out-of-class expression. Instead, the balance focused on the impact of a teacher's expression on the students in the classroom. As the court put it:

> The right to academic freedom, however, like all other constitutional rights, is not absolute and must be balanced against the competing interests of society. This Court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of extreme propagandism in the classroom. (Parducci p. 355)

The court then listed the factors it thought should be considered in determining this balance. These factors were:

Transparency #12
"ACADEMIC FREEDOM" FACTORS

Does the teaching approach
(1) materially disrupt classwork
(2) substantially disrupt the operation of the school
(3) invade the rights of others

Thus, in examining whether Parducci's assignment of "Welcome to the Monkey House" was an acceptable exercise of academic freedom the court had to examine the facts in light of these three factors.

Did the assignment disrupt classwork or the operation of the school? To this the court replied:

> Rather than there being a threatened or actual substantial disruption to the educational processes of the school, the evidence reflects that the assigning of the story was greeted with apathy by most students. (Parducci p. 356)

Therefore the answer to the first two questions was "no."

Did the assignment interfere with the rights of others? The court, in examining this question, took note of the fact that the few students who had objected to the assignment had been excused from having to read the story. Their rights had not been invaded. Thus the answer to the third question was also "no."

The court went on to say that, where First Amendment rights of teachers are involved, the school board is obligated to provide teachers with prior notice regarding the standards to be used for the content of teaching. In this case, the school board had no policies regarding what should not be taught in the classroom, forcing the teacher to "speculate as to what conduct is permissible and what conduct is proscribed" (Parducci p. 357). This, the court suggested, would make the teacher "overly cautious and reserved in the classroom" (Parducci

p. 357), a consequence that runs directly counter to the notion of academic freedom.

I need to caution you here that the standard developed by the court in this case has no legal force outside of the federal district in which it was made, namely the northern district of Alabama. However, there is reason to believe that this standard may be adopted widely by courts in other districts and by higher courts.

> Participants may question this assertion. Two facts suggest this conclusion. First, other lower courts have already ruled on this issue, using similar standards. Second, the standard itself was taken from a U.S. Supreme Court decision, Tinker v. Des Moines Independent Community School District [393 U.S. 503 (1969)]. This decision, referred to earlier in the workshop, was the first to establish the First Amendment rights of students when it declared unconstitutional the suspension of students for wearing armbands to protest the Vietnam War. The Court in Parducci borrowed this standard, reasoning that for teacher activities within the classroom, the effects of the teaching approach on students was the critical issue. It is likely that other courts will follow a similar line of reasoning.

5.0 CONCLUSION

Let us now take a final look at the hypothetical situation involving Fred Freethinker:

We suggested that since the writing of the letter was likely to be viewed as protected "speech" Fred could not be dismissed on that basis alone. The question then became whether, even in the absence of the letter-writing incident, Fred could have been dismissed on some other basis. We concluded that dismissal based only on Fred's failure to comply with the dress code was probably too extreme. The only other basis was Fred's use of an "obscene gesture" to illustrate the concept of symbolism. This now requires the application of the "academic freedom" standard.

First, is the use of an "obscene gesture" as a pedagogical tool actually obscene under the Court standard? This is unlikely.

Second, applying the standard, can it be said that the use of this illustrative technique disrupted the classroom or the operation of the school? Again, aside from a few calls from "irate parents," there appeared to be no evidence of this.

Third, did the use of the gesture interfere with the rights of others? No evidence of this was found either. In fact, several students said they thought its use was all right since the gesture was not directed at anyone in particular.

Finally, there was no evidence that Fred had been given any prior notice regarding standards for the content of his teaching.

Again, let me remind you that the standard for "academic freedom" is only suggestive since the Supreme Court has not ruled on it. A more conservative court might rule that a professional teacher should know, without prior notice, that such gestures are unacceptable in the classroom. A more liberal court could rule that the gesture was essentially harmless in the context in which it was delivered and, in any case, juniors in high school are certainly sophisticated enough to deal with a one time use of a gesture commonly employed by many high school students. We have no way of second guessing how a particular court might ultimately rule on the non-renewal of Fred's contract. I hope, however, that we all can carry from this workshop a framework of analysis that will suggest how a court might approach the issue of whether a particular action by a school board or official has violated a teacher's right to freedom of expression under the First Amendment.

Today's workshop has covered only a narrow spectrum of the constitutional

rights of teachers. Indeed, as was noted at the outset, we have covered in depth only one of the rights guaranteed in the First Amendment - freedom of speech. I hope that this workshop has whetted your appetites for an increased understanding of the legal rights of teachers.

LISTING OF COURT CASES MENTIONED IN THE TEXT

Anderson v. Central Point School District, 554. F. Supp. 600 (1982).

Board of Education of Island Trees Union Free School District v. Pico, 102 5.Ct. 2799 (1982).

Connick v. Myers, 103 S. Ct. 1684 (1983).

East Hartford Education Association v. Board of Education, F.2d 838 (1977).

Keyishian v. Board of Regents, 386 U.S. 589 (1967) at 603.

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1976).

Parducci v. Rutland, 316 F. Supp. 352, 354 (1970).

Pickering v. Board of Education, 391 U.S. 593, 567 (1978).

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

HANDOUT MASTERS

Handout #1

Fred Freethinker was known throughout the 3-R school district as one of the best and most outspoken English teachers at the high school level. He was in his third year as instructor of junior and senior English courses at Tradition High School.

At the beginning of his third year Fred was selected by the local teachers' union to be a member of the district's joint committee on curriculum. At the committee's monthly meetings Fred soon generated a certain amount of tension between teachers and administrators by being openly critical of what he considered to be the 3-R district's "archaic and outmoded" curriculum. He made numerous and repeated suggestions for its improvement, but the committee as a whole failed to approve anything that he suggested. Feeling frustrated at his impotence, Fred finally wrote a long letter to the editor of the local newspaper. In the letter he criticized in detail the 3-R high school curriculum calling it "extremely watered down" and suggested that the Assistant Superintendent in charge of Instruction, Dr. I.M. Wright, was more interested in improving his sailing skills than he was in trying to help students in the 3-R district receive a better education.

When the letter was published Fred expected it to be the focus of staff room discussion and anticipated that some students might want to discuss it in class. To his surprise and disappointment only one person made even a passing remark about it. A colleague from the English department commented vaguely to him in the hallway: "I saw your letter, Fred. Right on!"

On the other hand, Dr. Wright hit the roof when he saw this letter. He immediately went to the superintendent, Dr. E.Z. Duzzit, with the suggestion that the letter provided ample reason for Fred Freethinker's contract not to be renewed. Dr. Duzzit agreed but suggested that they proceed with caution.

"Let's keep an eye on this Mr. Freethinker," he said. "Perhaps he'll do something that will make our case even more solid." (It should be noted that, in the state where the 3-R district was located, while a district could refuse to renew a probationary teacher's contract "for any reasons deemed in good faith sufficient by the school board," those reasons had to be provided to the non-renewed teacher if he requested them).

A few weeks later Fred Freethinker did exactly the sort of thing that Dr. Duzzit was waiting for. The superintendent received calls from at least three irate parents complaining that Fred had made an "obscene gesture" in their children's english classes. Dr. Duzzit interviewed several students in the classes who confirmed that Fred had indeed used an obscene gesture with the middle finger of his right hand in order to introduce the concept of "symbolism" to his junior literature class. None of the students, including the children of the irate parents, seemed particularly upset by Fred's behavior. Several said they thought that what Fred had done was "O.K." because he wasn't really making the gesture at anyone in particular. Nevertheless, Dr. Duzzit decided that this behavior was sufficiently outrageous to constitute a second <u>bonafide</u> reason for the non-renewal of Fred's contract.

Added to this was Fred's persistent failure to comply with the district's dress code which expressly forbade the wearing of blue jeans by teachers. Fred frequently wore jeans and, when Dr. Wright had on one occasion drawn Fred's attention to the code, Fred merely replied that his wearing of jeans was an expression of his individuality. "I don't want my students thinking that I'm an Establishment man" he replied to Dr. Wright with a smile.

On March 30 Fred was among ten 3-R probationary teachers to receive notices of non-renewal from the school board. Dumbfounded, Fred immediately asked for reasons, and Dr. Duzzit sent him a memo which read, in part:

> The reasons for your non-renewal are based on three incidents reflecting poor professional judgment and an insensitivity toward the educational needs of the community:
>
> (1) Your letter to the editor, dated January 21, containing extreme and unwarranted criticism of the 3-R curriculum, as well as false and malicious statements about Dr. Wright, the Assistant Superintendent in charge of instruction.
>
> (2) Your use of an obscene gesture as a teaching device in a junior English class, contrary to principles of professional behavior and common decency.
>
> (3) Your failure to abide by the district dress code for teachers.

Fred Freethinker was outraged by these accusations and resolved not to give up without a fight. He immediately contacted an attorney who assured Fred that he quite possibly had a strong First Amendment case. He urged Fred to file a suit in federal court alleging that the 3-R board's non-renewal of Fred's contract was a violation of his right to free speech under the First Amendment of the U.S. Constitution.

Do you think Fred has a strong case? In your group, make up two lists. One list should contain all the reasons why you think Fred's right to free speech has been violated. The other list should contain all the reasons why you think the board's decision should prevail despite Fred's alleged right to free speech. Then, as a group, an agreement about which position you think would prevail in a court of law.

As conduct becomes less and less like "pure speech" the showings of governmental interest required for its regulation is progressively lessened . . . . In those cases where governmental regulation of expressive conduct has been struck down the communicative intent of the actor was clear and "closely akin to 'pure speech'". . . . It may well be, in an age increasingly conscious of fashion, that a significant portion of the population seeks to make a statement of some kind through its clothes. However, [the plaintiff teacher's] message is sufficiently vague to place it close to the "conduct" end of the "speech conduct" continuum — (*East Hartford* 562 F.2d 838 at 858)

Handout #3

STANDARDS FOR THE FOUR TYPES OF
"UNPROTECTED SPEECH"

(1) Obscenity
The Standard: It must be established that
(a) "the average person applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest
(b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and
(c) the work, taken as a whole, lacks serious literary artistic, political or scientific value.
[Miller v. California 413 U.S. 15 (1973)]

(2) Defamation (libel or slander)
The Standard: (libel only) It must be established that the printed statement was made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it was false or not. (applies only to public officials)
[New York Times v. Sullivan 376 U.S. 254 (1964)]

(3) Incitement to violence
The Standard: It must be established that the expression constitutes "fighting words" i.e., words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
[Chaplinsky v. New Hampshire 315 U.S. 568 (1947)]

(4) Threat to National Security
The Standard: It must be established that the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
[Brandenburg v. Ohio 395 U.S. 444 (1969)]

HANDOUT #4

Marvin Pickering, a teacher in the Township High School District 205, was concerned about the school board's priorities in the allocation of its funds. He felt far too much emphasis was being placed upon athletics, with huge sums being spent, for example, to maintain the football program. On the other hand, teachers were poorly paid, laboratories lacked decent equipment, many classrooms lacked doors, and sidewalks were in poor condition. Furthermore, letters to the editor of the local paper by board members and administrators had, Pickering felt, misrepresented how the funds were actually being spent.

So Pickering wrote a letter to the editor in which he voiced many of the above concerns. The Township School Board claimed that the letter was filled with inaccuracies and, on the whole, was false. It determined that the publication of the letter and the subsequent furor it provoked was "detrimental to the efficient operation and administration of the schools of the district," a basis for dismissal under the state statute. The board therefore dismissed Pickering, who promptly filed suit in state court. [Based on Pickering v. Board of Education 391 U.S. 593 (1968)]

Handout #5

1. Does the incident involve speech rather than conduct?

2. If it is speech, is it protected? The answer is "no" if it is:

   a. obscene

   b. defamatory

   c. an incitement to violence

   d. a threat to national security

3. If it is "protected speech" then a court applies a balancing test in which it weighs the interest of the teacher in commenting upon matters of public concern against the interest of the school board in promoting the efficiency of the educational system. In weighing these competing interests the court must examine whether

   a. The speech at issue addresses a "matter of public concern." If it does not, First Amendment protection will not be given.

   b. Any of the following has been affected by the speech at issue:

      i. maintenance of discipline by the immediate superior
      ii. harmony among coworkers
      iii. proper performance by the teacher in the classroom
      iv. operation of the schools generally

      If the speech affects any of the above, First Amendment protection will not be given.

4. Even if the school board cannot prove any of the factors in 3(b), the sanction against the teacher for his/her speech activity is still <u>not</u> a violation of his/her First Amendment rights if the board can show, by a preponderance of the evidence, that it would have reached the same decision regarding the sanction even in the absence of the protected activity.

HANDOUT #6

Doyle, an untenured high school teacher, had held two one-year contracts with the Mt. Healthy City School Board and was in the second year of a two-year contract. During the previous year Doyle had been president of the local teachers' association and this year he was on its executive committee.

During the course of the year Doyle was involved in several incidents that eventually came to the attention of the school board. At one point he got into an altercation with another teacher who struck him. Both teachers were temporarily suspended. On another occasion Doyle became enraged at one of the employees in the school cafeteria because his portion of spaghetti was too small. Doyle had also been overheard to refer to students he was disciplining as "sons of bitches" and was seen to make an obscene gesture at two girls who ignored his commands as cafeteria supervisor. Finally, Doyle reacted to a memo on teacher dress and appearance by sending it to a local radio station, which treated it as a news item about a new "dress code" for teachers in the local schools.

A month later the superintendent, in making his recommendations for nonrenewal of untenured teachers, included Doyle on the list. Doyle, upon being notified of his nonrenewal, requested a statement of the reasons. The statement he received indicated that Doyle had exhibited "a notable lack of tact in handling professional matters which leaves much doubt as to [his] sincerity in establishing good school relationships." References to the incidents described above followed the statement.

The school board voted to approve the superintendent's recommendation not to renew Doyle's contract. [Based on Mt. Healthy School District Bd of Educ. v. Doyle 429 U.S. 274 (1976)]

Handout #7

Marilyn Parducci, a high school English teacher, had assigned as outside reading to her junior English class a story entitled "Welcome to the Monkey House" by Kurt Vonnegut, Jr. Most of the students read the assigned story but three students asked to be excused from reading the story because they objected to its content. The parents of these children phoned the principal, who read the story and was upset by the references to "free sex" and to the satiric suggestion that killing elderly people would help solve the population explosion. He called Ms. Parducci into his office and directed her to cease the teaching of the story in any of her classes. Ms. Parducci replied that she considered it a literary work worthy of study, and that although she didn't want to cause trouble, she felt obligated, as a professional, to continue teaching the story. Shortly thereafter, upon the recommendation of the principal, the school board dismissed Ms. Parducci on grounds of insubordination for disobeying the directives of her principal. [Based on Parducci v. Rutland 316 F. Supp 352 (Alabama, 1970)].

TRANSPARENCY MASTERS

TRANSPARENCY #1

OBJECTIVES OF WORKSHOP

To explore and define

1. **Freedom of speech**

2. **Academic freedom**

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging *the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

THRESHOLD QUESTIONS

1. **Does the incident in question involve "speech" and not merely "conduct"?**
2. **Even if the action is "speech," is it so outrageous as to be unprotected by the First Amendment?**

TYPES OF SPEECH UNPROTECTED BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement of Violence
4. Threat to National Security

THE "BALANCING TEST"

Right of Individual to Freedom of Speech

Interest of the State in Performing Public Service

a. Inefficiency;

b. Immorality;

c. Insubordination;

d. Neglect of duty;

e. Physical or mental incapacity;

f. Conviction of a felony or of a crime involving moral turpitude;

g. Inadequate performance;

h. Failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or

i. Any cause which constitutes grounds for the revocation of such permanent teacher's teaching certificate.

"The problem, in any case, is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [*Pickering v. Board of Educ.* 391 U.S. 593, 567 (1978)]

TYPES OF SPEECH UNPROTECTED BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement of Violence
4. Threat to National Security

Does the teacher's speech affect

1. **maintenance of discipline by his/her immediate superiors?**
2. **harmony among co-workers?**
3. **proper performance in the classroom?**
4. **operation of the school generally?**

1. **What are "issues of public concern?"**
2. **What can be done in the case of a teacher who engages in both "protected" and "unprotected" expression?**

TYPES OF SPEECH UNPROTECTED BY THE FIRST AMENDMENT

1. Obscenity
2. Defamation
3. Incitement to Violence
4. Threat to National Security

"ACADEMIC FREEDOM" FACTORS

Does the teaching approach

1. **materially disrupt classwork?**
2. **substantially disrupt the operation of the school?**
3. **invade the rights of others?**